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FEB 24 1937

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 325.

OCTOBER TERM, 1936.

MORLEY CONSTRUCTION COMPANY AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, RESPONDENT.

MOTION FOR REHEARING AS TO THE MERITS AND FOR FINAL DISPOSITION OF CAUSE.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

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MOTION FOR REHEARING AS TO THE MERITS AND FOR FINAL DISPOSITION OF CAUSE.

Now come petitioners and respectfully pray this Honorable Court grant a rehearing on the merits and to modify its judgment herein by deciding this cause on its merits for the following reasons, to-wit:

Because this case was begun in the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, on the 27th day of November, 1933; that as a result thereof and of the decree of the trial court herein all assets of petitioner,

Morley Construction Company, have been in effect sequestered so that it is unable to pay its creditors or collect from its debtors; that after the decision herein by this court on the first day of February, 1937, the respondent, Maryland Casualty Company, filed a motion in the office of the clerk of the United States Circuit Court of Appeals which motion is in words and figures as follows:

In the United States Circuit Court of Appeals for the Eighth Circuit. Morley Construction Company, a Corporation, and Merchants Bank of Kansas City, Missouri, a Corporation, Appellants, vs. Maryland Casualty Company, a Corporation, Appellee. No. 10477.

Motion to Set Down for Reargument.

Now comes appellee, Maryland Casualty Company, and respectfully prays the court to set down the above-entitled cause for oral argument at such time and place as to the court may seem advisable.

SPENCER F. HARRIS,
PAUL G. KOONTZ,
Attorneys for Appellee.

Received copy hereof this 4th day of February, 1937.
MARTIN J. O'DONNELL,

Attorneys for Appellants.

And at the same time wrote a letter to Judge Booth, the judge of the said Circuit Court of Appeals for the Eighth Circuit, who delivered the opinion in the said cause, which letter is in words and figures as follows:

Law Offices of
HARRIS & KOONTZ
515 Commerce Building
Kansas City, Mo.

February 4, 1937.

Spencer F. Harris
Paul G. Koontz
Harry F. Murphy
Wayne Hemphill

Telephone
Harrison 4602

Judge Wilber F. Booth
United States Circuit Court of Appeals
Eighth Circuit
St. Paul, Minnesota

Dear Judge Booth:

We have received a copy of the opinion rendered by the Supreme Court in the case of Morley Construction Company, *et al*, vs. Maryland Casualty Company, *et al*, on certiorari from the United States Circuit Court of Appeals (No. 10477), a copy of which opinion we are enclosing herewith.

From this opinion it appears that the Supreme Court has reversed the decision of the Court of Appeals and has remanded the cause to the Court of Appeals for the purpose only of determining whether or not a decree of exoneration granted by the District Court was proper under the circumstances.

We feel that we would like to reargue this case, addressing our argument solely to the question of exoneration, and we accordingly have prepared a motion to have the case set down for reargument on that one point, a copy of which motion we are enclosing herewith. We are making this request because we feel that it was the opinion of the Court of Appeals that appellee was entitled to relief and that inasmuch as the Supreme Court has foreclosed the question of specific performance, we should be per-

mitted to again present orally the question of exoneration.

Very truly yours,

HARRIS & KOONTZ

By SPENCER F. HARRIS

SFH:PW

CC-Mr. Martin J. O'Donnell

That, thereafter, the counsel for petitioners received a letter from the clerk of the United States Circuit Court of Appeals in words and figures as follows:

UNITED STATES CIRCUIT COURT OF APPEALS
Eighth Circuit

E. E. Koch, Clerk
10477

St. Louis, Mo.,
February 4, 1937.

Messrs. Buchholz & O'Donnell,
1657 Dierks Building,
Kansas City, Mo.

Dear Sirs:

I notice in the newspaper reports that the case of Morley Construction Company v. Maryland Casualty Company, No. 10477, was remanded by the Supreme Court to this Court for further proceedings, and I am short of copies of the printed record. If you have or can obtain any copies of the record as printed for use in this Court kindly send same to this office as copies will no doubt be necessary for a probable resubmission to this Court.

Yours truly,

E. E. Koch
Clerk.

Weh.

That it is evident that respondent desires and the clerk of the circuit court of appeals seems to think that the cause must be set down for a reargument at the next term of said court of appeals after the receipt by the clerk of said court of appeals of the mandate of this court in said cause; that if the judgment and opinion herein be not modified by disposing of the case on the merits, then it may be necessary to have the record reprinted in the United States Circuit Court of Appeals and the cause reargued; that the said cause may not be finally determined within a year from this date in the said circuit court of appeals and it may be that another application for certiorari to this court may be filed to review the next decision of the said circuit court of appeals in this cause; that if the case be remanded without a decision on the merits by this court then due to the delay a great hardship will result to the petitioner, Morley Construction Company, and its creditors who are entitled to be paid without further delay.

That this motion is filed so that this cause may be here disposed of in accordance with the principles stated in *Re Boston & M. R. Co.* v. *Gokey,* 210 U. S. 155, 52 Law Ed. 1002, this court said:

> "As a certiorari was issued in this case, it is now before us on the return to that writ, and we have power to render such judgment as the circuit court of appeals should have rendered, or we might reverse the judgment of affirmance by that court, and send the case back to it to decide the question of jurisdiction, which it had refused to pass upon.

We think it would be an unnecessary hardship to the plaintiff to do the latter, because of the further delay that would thereby be caused. The accident occurred in 1901, and the trial resulted in a very moderate verdict, considering the injury, and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment."

The opinion of the court of appeals in so far as it discusses the subject of exoneration demonstrates that that relief was erroneously granted in this cause by the trial court and that the decree granting same should be reversed. Both parties have briefed this case in this court on the merits and especially on the subject. A further delay will work an extraordinary hardship on all parties and the fact that the respondent desires to have the cause reset for argument doubtless necessitates a new printing of the record in the circuit court of appeals and new briefs and may result in the further delay of another year. The suit in the court below will soon be four years pending and the money of the construction company is held by the Treasurer of the United States without interest. We respectfully submit that if a motion for hearing were granted herein the cause could be resubmitted on briefs without additional argument and the judgment of the district court reversed without all the unnecessary hardship, expense and delay incident to returning the case for consideration on the merits to the United States Circuit Court of Appeals. We, therefore, very respectfully submit that this Honorable Court sustain this motion and modify its opinion or judgment by deciding the case on the merits

and reversing the decree of the district court so that the case may be finally terminated.

Wherefore, petitioners respectfully pray this Honorable Court, either to grant a rehearing of this cause on the merits so that it may be presented on the merits or that the court will examine the briefs on the merits which have been filed in this court and cause and particularly to examine the opinion of the circuit court of appeals on the question of exoneration and the brief of appellant from page 60 to the end thereof, on that subject, and if it can dispose of the case without a reargument to decide the said cause on its merits and render a final decision disposing of all the issues in said cause.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

We hereby certify that the above motion is presented in good faith and not for delay but to prevent delay.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.